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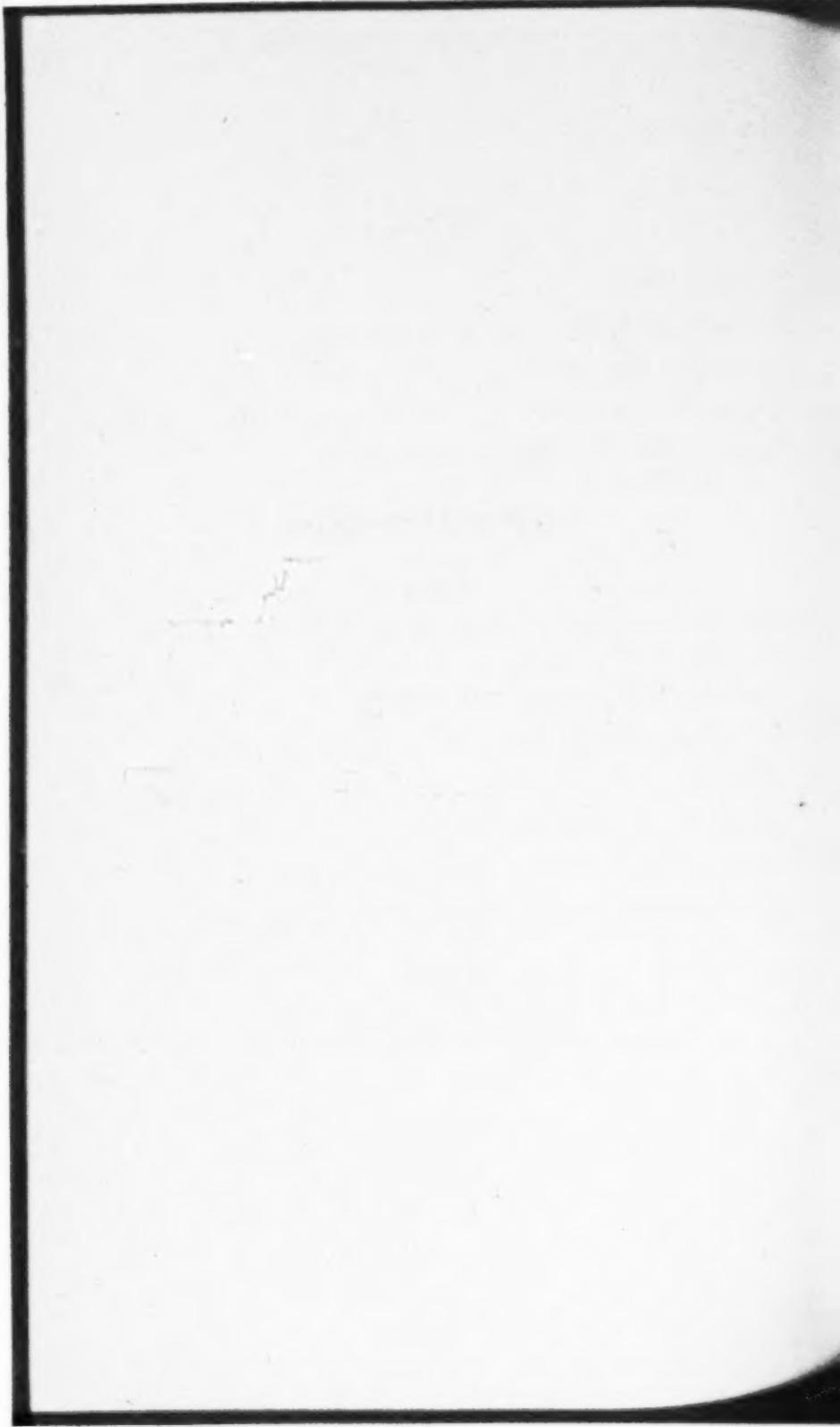
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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No.

SOBEL CORRUGATED AND WOODEN BOX COMPANY,

Petitioner,

vs.

PHILIP B. FLEMING,
Administrator, Office of Temporary Controls,

Respondent.

PETITION FOR WRIT OF CERTIORARI To The United States Circuit Court of Appeals For the Sixth Circuit.

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit affirming the judgment of the District Court of the United States for the Northern District of Ohio, Eastern Division, entered January 12, 1948.

OPINION BELOW.

The opinion of the court below filed January 12, 1948 is printed in the record at page 107, *et seq.*

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938.

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed January 12, 1948 and judgment entered on that date.

QUESTIONS PRESENTED.

1. After the filing of an action by an agency of the United States for alleged violation of its regulation, the existence and extent of such violation, if any, being readily determinable by the court from the provisions of the regulation itself, and after issues joined thereon, may the agency issue a retroactive order specifically resolving such issues in its favor, both as to existence and extent?
2. May the Congress of the United States deprive the court, to which such issues are presented, of the power to consider and pass upon the validity of such administrative retroactive order?

SUMMARY STATEMENT.

On June 16, 1945 the Price Administrator filed a complaint in the District Court against petitioner for "treble damages," alleging that during the year *preceding* the defendant had sold boxes "at prices in excess of the maximum price established therefor by Maximum Price Regulation No. 187." Answer of defendant filed August 31, 1945 denied any violation of the Regulation.

On September 17, 1946, fifteen months after filing of said action, the plaintiff *sua sponte*, and not on application of defendant, issued an administrative *retroactive* order fixing dollars and cents ceiling prices applicable to the transactions covered by his complaint (Pl's. Ex. No. 4).

M. P. R. 187, Section 1(c) provides that the manufacturer shall use the same general methods of computing prices as were used October 1-31, 1941. Section 1(c)(3)(v) permits the manufacturer to price "by the same accounting and cost practices which he had in effect during the period October 1-31, 1941" or to change such practices so long as the change does not result in a higher price than that predicated on the old practice.

In the trial court plaintiff offered no evidence of ceiling price computed under the provisions of the Regulation

as above described. On the contrary, plaintiff relied entirely on a tabulation showing the difference between prices charged and those computed and made retroactive under the administrative order aforesaid. Plaintiff's chief witness freely admitted that although he *could readily have checked defendant's prices against base period prices, he did not do so* (T. 34); that he *could not and would not say* that prices charged by defendant were higher than those charged in October, 1941 (T. 35); that he "*wasn't concerned*" with that fact (T. 35).

Despite defendant's objections to admissibility, applicability and validity of the retroactive administrative ex parte order, the trial judge held that it was binding and conclusive upon him and that he could not consider its validity. (Paragraph 6 of Conclusions of Law. T. 90.) He therefore entered judgment on the basis thereof and the Circuit Court affirmed.

REASONS FOR GRANTING THE PETITION.

The opinion of the Circuit Court of Appeals for the Sixth Circuit in this cause is directly *contra* to that of the Emergency Court of Appeals rendered on January 2, 1947 in *Collins vs. Fleming*, 159 F. 2d 431, cert. den. April 7, 1947. 67 S. Ct. 1094.

The facts in the *Collins* case are indistinguishable from those in the instant cause. The opinions are irreconcilable.

In answer to the question first hereinabove presented, the Emergency Court of Appeals at page 438 says:

"We think that the Price Administrator was without power to make a determination, through the medium of what purported to be a retroactive price order, of the question thus committed to the district court."

To the second question posed, respecting judicial power to pass upon such retroactive order, the Emergency Court gives an emphatic answer:

"The price regulations and orders authorized to be issued by the Price Administrator under Section 2 of the act, 50 U. S. C. A. Appendix, Paragraph 902, and which are incontestable in the district courts under Section 204(d) are limited to those which will effectuate the purposes of the act. Order No. 45 did not effectuate any one of those purposes, however. Since its only object was to liquidate the damages in a pending suit between the Price Administrator and a group of alleged overceiling sellers it could only derive its authority from the act if one of the purposes of the act was to authorize the Price Administrator to decide issues of fact with respect to past transactions which he himself has already committed to a court for adjudication. We are satisfied that Congress had no such purpose in mind in passing the act and it is most doubtful whether Congress could have so provided if it had desired to do so. For, as we recently had occasion to say in *Lee v. Fleming*, Em. App. 1946, 158 F. 2d 984, 'such action would not only appear to involve the usurpation of judicial power which is vested in the courts alone, but would also clearly be at war with the fundamental concept of due process of law that parties to controversies are entitled to have them determined by an impartial tribunal.' " (Emphasis supplied.)

The Circuit Court of Appeals has not only failed to distinguish, but apparently to understand, the *Collins* case. The Emergency Court of Appeals held that a retroactive order of the kind here involved served only "to liquidate the damages in a pending suit," and since it did not "effectuate the purposes of the act," it was not within the class of orders "which are incontestable in the District Courts." Obviously, the trial court was not bound thereby.

After the Emergency Court of Appeals has held that it does not have exclusive jurisdiction in any such case, the Circuit Court, flying directly in the face of such pronouncement, still insists:

"The District Court correctly held that it had no jurisdiction to consider the validity of the order attacked because this question could be determined only by the Emergency Court of Appeals after protest to the Administrator."

In support of the foregoing propositions the Circuit Court cites *Yakus vs. United States*, 321 U. S. 414 and *Shrier vs. United States*, 149 Fed. (2d) 606, both of which have nothing to do with retroactive orders of the kind here in issue. Then, piling contradiction upon confusion, the Circuit Court says:

"This principle is reiterated by the Emergency Court of Appeals in *Collins vs. Fleming*, 159 Fed. (2d) 431, 438, a case upon which Sobel relies heavily. It should be observed that the validity of the questioned order in the *Collins* case was decided by the Emergency Court of Appeals, after protest to the Administrator, and not in the District Court proceedings. In our case, Order L-11 and the amendment of September 16, 1946, were not even protested before the Administrator.

"In view of our lack of jurisdiction we find no necessity for a discussion of *Collins v. Fleming* except to say that we have reviewed the facts of that case and conclude that they have no application to the situation here."

To say that the "principle is reiterated * * * in *Collins v. Fleming*" is to say that black is white. Although "the validity of the questioned order in the *Collins* case was decided by the Emergency Court of Appeals, after protest to the Administrator," to draw an inference therefrom that validity can be attacked only in a protest proceeding is to say that white is black. The Circuit Court has said, in effect, that the Emergency Court had no power to determine that the Circuit Court had jurisdiction.

Having determined that it had no jurisdiction—after the Emergency Court had said that it did—the Circuit Court nevertheless seeks another ground to sustain its rul-

ing. It cites *Porter vs. Senderowitz*, 158 Fed. (2d) 435, and *Martini vs. Porter*, 157 Fed. (2d) 35 to show that the retroactive order was reasonable. Similiar rulings are found in *Porter vs. Schaefer*, 69 F. S. 1013 (D. C. S. D. Cal.) and *Porter vs. Kramer*, 156 F. 2d 687 (CCA 8). But none of said cases has any application to the case at bar. It is interesting further to note specifically that the *Senderowitz* and *Martini* cases were decided before the *Collins* case and were argued and briefed by the government in the Emergency Court of Appeals.

Casual examination reveals why the Emergency Court of Appeals did not deem those cases applicable to the facts in the *Collins* case. In each and every such case, *the seller was prohibited from selling unless and until he first applied for and was granted a ceiling price*. It was the failure so to apply, coupled with the exclusive power of the Administrator to fix the price, and *the absence of any standard in the regulation of determining the ceiling*, that permitted, nay required, a retroactive order. But petitioner herein, just as in the *Collins* case, was not obliged to apply, did not apply, and the method of determining ceiling price is spelled out in the regulation itself. Thus we have a nullification of the *Collins* decision and a distortion of the *Senderowitz*, *Martini*, *Schaefer* and *Kramer* cases.

If the opinion of the court below be not reversed there will result a dangerous extension of unilateral administrative power at the expense of the judicial process. Under the doctrine therein enunciated, the executive branch can become plaintiff, judge and jury, can relegate the Court to the role of a mere scrivener, and due process of law will become an empty shell.

The decision below, conflicting as it does with that of the Emergency Court of Appeals, leaves the law in uncertainty. Determination of this question by this Court will settle the point of law, remove the uncertainty, and make

for uniformity of decisions hereafter in cases involving judicial scrutiny of administrative power.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment below should be granted.

HOWARD R. HIRSCH,

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OPPOSITION

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 708

SOBEL CORRUGATED AND WOODEN BOX COMPANY, PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR, OFFICE OF TEMPORARY
CONTROLS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 107-111) is reported at 165 F. 2d 568.

JURISDICTION

The judgment of the circuit court of appeals was entered January 12, 1948 (R. 105). The petition for a writ of certiorari was filed on March 31, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court in an enforcement action under Section 205 of the Emergency Price Control Act of 1942, as amended,

(1)

may pass on the validity of an individual order issued by the Price Administrator directed to defendant retroactively specifying maximum prices governing defendant's sales.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, are set forth in the Appendix, *infra*, pp. 10-13.

STATEMENT

Maximum Price Regulation No. 187—Certain Paperboard Products,¹ was issued in July 1942, and was revised and reissued as Revised Maximum Price Regulation No. 187² on October 21, 1943. It contained certain record keeping requirements and provided for the mandatory reporting of pricing formulae with the Office of Price Administration. Petitioner, a manufacturer of corrugated boxes covered by the regulation, failed to comply with the record keeping and reporting requirements (R. 89). In the early part of 1943, the Office of Price Administration commenced an investigation to determine petitioner's proper maximum prices under the regulation (R. 17ff., 45 ff.). Despite repeated efforts, the investigators were unable to secure sufficient and adequate information (R. 26, 85-86).

On February 28, 1945, the Price Administrator instituted an action against petitioner under Section 205(a) of the Emergency Price Control Act of 1942, as amended (R. 2-5), seeking an injunction against further sales by petitioner without compliance with the record keeping and reporting provisions of the regulation or otherwise in violation thereof, and a mandatory injunction requiring petitioner to prepare and preserve records and to file its pricing formulae as required by the regulation (R. 5). On March 3, 1945, petitioner filed a report with the Office of Price Adminis-

¹ 7 F. R. 5780.

² 8 F. R. 14395.

tration (R. 7, 108). This report, however, was rejected as inadequate (R. 108), and on March 27, 1945, petitioner filed another report, which admittedly did not comply with the requirements of the regulation (R. 108).³

On April 18, 1945, the Price Administrator issued Order No. L-11⁴ under Revised Maximum Price Regulation No. 187, setting pricing formulae for use in determining petitioner's maximum prices (R. 109). On June 16, 1945, the Administrator filed an amended complaint (R. 8-13), alleging overceiling sales by petitioner "since June 5, 1944" (R. 12), and requesting treble damages for such overceiling sales under Section 205(e) of the Act, in addition to injunctive relief (R. 12-13).

On September 17, 1946, the Administrator amended Order No. L-11 by adding thereto a provision that:

The maximum prices established for your corrugated boxes by the use of this pricing formula shall be applicable to all sales of corrugated boxes made by the Sobel Corrugated and Wooden Box Manufacturing Company since they came within the control of Maximum Price Regulation 187 or Revised Maximum Price Regulation 187, whether made before or after April 18, 1945. [Cf. R. 89, 110].

The case went to trial, without a jury, on January 6, 1947 (R. 16), and on January 20, 1947, judgment was entered

³ It was stipulated below that the exhibits at the trial need not be reprinted in the record, but that they might be presented to the circuit court of appeals by either party (R. 101). Included in the exhibits were the reports by petitioner and the rejection thereof by the Office of Price Administration. These materials were submitted to the court below and are referred to in the court's opinion, although they do not appear in the record.

⁴ Under the stipulation in the court below (R. 101), Order No. L-11, which was introduced as an exhibit in the trial court, does not appear in the record. We have lodged with the Clerk of this Court certified copies of Order No. L-11 and the amendment thereof as contained in the records of the Office of Price Administration now in the custody of the National Archives.

for the Administrator (R. 91) in the amount of twice the overcharges (R. 90).⁵ The amount of the overcharges was computed as the difference between the prices reached by the application of the formulae set forth in Order No. L-11 and the prices actually charged by petitioner (R. 26, 53).⁶ The trial judge ruled that he was without jurisdiction to consider the validity of Order No. L-11 and its amendment (R. 85-90).

After judgment, petitioner applied for leave to file a complaint in the Emergency Court of Appeals under Section 204(e) of the Emergency Price Control Act of 1942, as amended, "setting forth objections to the validity of Order L-11, dated April 18, 1945 and the amendment to said Order dated September 17, 1946" (R. 95). This motion was denied on February 11, 1947 (R. 96).

A notice of appeal was filed on April 16, 1947 (R. 97), and the judgment of the circuit court of appeals affirming the judgment of the district court was entered on January 12, 1948 (R. 105). The circuit court of appeals held that there was no jurisdiction in the enforcement court to consider the validity of Order No. L-11, either as originally issued or as amended (R. 110).

ARGUMENT

1. Petitioner seeks to have this Court rule that the Administrator was without authority to issue Order No. L-11 retroactively establishing maximum prices for petitioner's sales (Pet. 2). In other words, petitioner contends that

⁵ By the time of trial the prayer for injunctive relief had become moot since the commodities were no longer subject to price control. The court therefore took no action on the prayers for injunctive relief. (Cf. R. 108.)

⁶ The original judgment for \$26,337.50 was subsequently reduced to \$25,144.22 to eliminate damages arising out of sales made more than one year prior to the filing of the amended complaint (R. 96).

Order No. L-11, as amended, was invalid. By the unequivocal language of Section 204(d) of the Act (Appendix, *infra*, p. 11), however, the validity of an order or regulation issued by the Price Administrator cannot be challenged or determined in an enforcement action under Section 205. *Lockerty v. Phillips*, 319 U. S. 182; *Yakus v. United States*, 321 U. S. 414, 427-431; *Bowles v. Seminole Rock Co.*, 325 U. S. 410, 418-419.

The exclusiveness of the jurisdiction of the Emergency Court of Appeals to determine questions of validity of administrative orders and regulations under Section 2 of the Emergency Price Control Act is complete, and does not depend upon the nature of the asserted grounds of invalidity. The fact that invalidity is claimed on the ground of illegal retroactivity of the order does not confer jurisdiction on the enforcement court. Cf. *Porter v. Eastern Sugar Associates*, 159 F. 2d 299, 302 (C. C. A. 4).

The applicable law on the subject is perhaps best illustrated by the *Senderowitz* cases. In July 1944, the Price Administrator instituted a treble damage action alleging overceiling sales by the defendants between March 1943 and April 1944, in violation of the General Maximum Price Regulation. Although the regulation required them to do so, the defendants had not previously applied to the Administrator for approval of maximum prices. In August 1944 they filed the required reports with the Office of Price Administration, and in October 1944 the Administrator issued an order establishing their maximum prices under the regulation. In May 1945, the Administrator amended this pricing order so as to make it expressly applicable to the defendants' prior sales. The district court dismissed the complaint, holding that since the order was not in existence at the time the action was commenced there was no cause of action. *Bowles v. Senderowitz*, 65 F. Supp. 548 (E. D.

Pa.) The Circuit Court of Appeals for the Third Circuit, in a unanimous opinion, reversed the district court. *Porter v. Senderowitz*, 158 F. 2d 435, certiorari denied, 330 U. S. 848. During the pendency of the enforcement action the defendants filed a protest under Section 203(a) of the Act, attacking the validity of the order. The Administrator denied the protest (*In the Matter of Morris H. Senderowitz, et al.*, OPA Serv., Ops. & Decs., Vol. 4, p. 641), and a complaint was then filed in the Emergency Court of Appeals.

The opinion of the Emergency Court of Appeals was written by Chief Judge Maris, who had sat as a member of the Circuit Court of Appeals for the Third Circuit in the enforcement action. The opinion of the Emergency Court of Appeals related the history of the enforcement action as follows (*Senderowitz v. Clark*, 162 F. 2d 912, 913) :

[The district court] dismissed the complaint in so far as it was based upon sales of styles 259 and 467, being of the opinion that since Order No. 112 which established maximum prices for these styles was not issued until after the complaint had been filed the complaint stated no cause of action as to the sales of that commodity. The Circuit Court of Appeals reversed, holding that for the purposes of the enforcement action Order No. 112 as amended must be treated as valid and applied retroactively in accordance with its terms and that any attack upon its validity must be made in the Emergency Court of Appeals.

The opinion then proceeded to consider the validity of Order No. 112, on the merits, and concluded that, under the circumstances presented, it was invalid.

Thus the circuit court of appeals was bound by the order; but the Emergency Court of Appeals exercised its jurisdiction to decide the validity of the order. This result was necessitated by the clear language of the Act. We submit that the action of the circuit court of appeals in the *Sender-*

owitz case is the controlling precedent in the instant case, which is also an enforcement action under Section 205 of the Act. Neither *Collins v. Fleming*, 159 F. 2d 431 (E. C. A.), certiorari denied, 330 U. S. 850,⁷ relied on by petitioner (Pet. 3), nor the Emergency Court of Appeals' *Senderowitz* decision, *supra*, supports petitioner. The issues decided by the Emergency Court of Appeals in those cases could not properly be presented to or decided by a district court in an enforcement action such as the present.⁸

⁷ In *Martini v. Porter*, 157 F. 2d 35 (See Pet. 6), the Circuit Court of Appeals for the Ninth Circuit refused to dismiss an enforcement action in which the applicable ceiling price was established by a retroactive order under the General Maximum Price Regulation. To the same effect was the decision of the Third Circuit in the *Senderowitz* case. In the *Collins* case the Emergency Court of Appeals declared invalid a retroactive pricing order issued under a regulation identical in all material respects with the General Maximum Price Regulation. This Court denied certiorari in all three cases on the same day (330 U. S. 848 and 850), although the opinions of the circuit courts of appeals were in conflict with that of the Emergency Court to the extent that the circuit courts of appeals had considered and discussed the validity of the orders involved. Cf. Petition for certiorari in *Fleming v. Collins*, O.T. 1946, Nos. 1080-1082, p. 10; Memorandum for the Respondent in *Martini v. Fleming*, O.T. 1946, No. 813, pp. 7-9; Memorandum for the Respondent in *Senderowitz v. Fleming*, O.T. 1946, Nos. 677 and 678, p. 12. The Government contended that these decisions were not inconsistent because of the doctrine of exclusive jurisdiction.

⁸ We do not intend to imply in any manner that the present case would be controlled by the Emergency Court of Appeals' decision in the *Collins* and *Senderowitz* cases if petitioner had properly presented the validity of Order No. L-11 to that court. The Emergency Court decided those cases on the basis of the particular circumstances presented, including the precise language of the regulations under which the contested orders were issued. That court has not condemned all retroactive pricing orders *per se*. The maximum price regulation involved in the instant case differs materially from those involved in the *Senderowitz* and *Collins* cases, and there are significant factual distinctions. Cf. the statement of the court below (R. 110): "In view of our lack of jurisdiction we find no necessity for a discussion of *Collins v. Fleming* except to say that we have reviewed the facts of that case and conclude that they have no application to the situation here."

2. Petitioner sets forth the following as a second question presented (Pet. 2):

May the Congress of the United States deprive the court, to which such issues are presented, of the power to consider and pass upon the validity of such administrative retroactive order?

However, this question is not discussed in the petition, and it does not appear to have been raised at any earlier stage of the proceeding.⁹

In any event, the exclusive jurisdiction provision of the Emergency Price Control Act has been upheld by this Court. *Yakus v. United States, supra*. Petitioner had available not only the protest proceeding,¹⁰ which this Court held was sufficient to accord due process of law, but also the additional remedy of seeking leave in the district court to attack the order by a direct complaint in the Emergency Court of Appeals under Section 204(e) (1) of the Act.¹¹ Petitioner applied for leave to file a direct complaint under Section 204(e) (R. 95), but its application was denied (R. 96). Although the denial of such leave was set forth as one of the grounds for appeal (R. 97), petitioner appears not to have pressed this point in the court below and it is not urged in the petition for a writ of certiorari.¹² The

⁹ The constitutionality of the Act (with a limited exception not here 'relevant), as distinguished from the validity of an administrative regulation or order, may be passed upon in an enforcement action. *Taylor v. Porter*, 156 F. 2d 805, 808 (E.C.A.), certiorari denied, 329 U. S. 782.

¹⁰ Both Order No. L-11 and its amendment specifically stated that they were "subject to protest in accordance with Revised Procedural Regulation No. 1."

¹¹ Section 204(e) was inserted in the Act by Section 107 of the Stabilization Extension Act of 1944, 58 Stat. 639, enacted June 30, 1944, after the *Yakus* decision.

¹² Denial of an application for leave to file a complaint in the Emergency Court of Appeals under Section 204(e) of the Act is appealable. *United States v. Horns*, 147 F. 2d 57, 59 (C.C.A. 3, opinion by Maris, J.); *United States v. Mayfair Meat Packing Corporation*, 158 F. 2d 685, 686 (C.C.A. 2), certiorari denied, 331 U. S. 805. Cf. *United States v. Steiner*, 152 F.

Act on its face clearly provided ample opportunity for judicial review of administrative orders and regulations. That petitioner has not actually had such review of Order No. L-11 is due not to any provision of the Act, but rather to its own failure properly to pursue its available statutory remedies.¹³

CONCLUSION

The decision below is correct and the petition for a writ of certiorari presents no question warranting further review by this Court. The petition should, therefore, be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
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✓ T. VINCENT QUINN,
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APRIL 1948.

2d 484, 488 (C.C.A. 7), certiorari denied, 327 U. S. 789; *Dowling Bros. Distilling Co. v. United States*, 153 F. 2d 353, 356 (C.C.A. 6), certiorari denied, 328 U. S. 848; *Watts v. United States*, 161 F. 2d 511, 513 (C.C.A. 5), certiorari denied, 332 U. S. 769.

¹³ It is impossible on the present record to discuss the propriety of the district court's denial of the motion for leave to file a complaint in the Emergency Court of Appeals. So far as the record shows (R. 95), petitioner did not state the objections which it sought to raise in the Emergency Court (cf. *Fournace v. Bowles*, 148 F. 2d 97 (E.C.A.), certiorari denied, 325 U. S. 884), nor did it allege "good faith" and "reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203(a)", as required by Section 204(e)(1).

APPENDIX

The pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended (50 U. S. C. App., Supp. V, Secs. 901-946), are:

Sec. 203 (a), as amended by sec. 106 of the Stabilization Extension Act of 1944, 58 Stat. 632:

At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * *¹⁴

Sec. 204(a):

Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. * * *

¹⁴ By The Supplemental Appropriation Act, 1948, 61 Stat. 619, the following was added at the point indicated: "*Provided, however,* That a protest setting forth objections to any provisions of such regulation, order, or price schedule with respect to which responsibility was transferred to the Department of Commerce by Executive Order 9841 may no be filed more than one hundred and twenty days after issuance of such regulation, order, or price schedule or sixty days after the enactment of this amendment, whichever is the later."

Sec. 204(d) :

• • • The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Section 204(e), added to the Act by Section 107(b) of the Stabilization Extension Act of 1944, amended by 59 Stat. 308 (1945) :

(1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate.¹⁵ The court in which the pro-

¹⁵ The Supplemental Appropriation Act, 1948, 61 Stat. 419, amended the first sentence to read: "Within sixty days after the date of enactment

ceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203(a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with the subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of

of this amendment, or within sixty days after arraignment in any criminal proceedings and within sixty days after commencement of any civil proceedings brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or alleged violation of any price schedule effective in accordance with the provisions of section 206 with respect to which responsibility was transferred to the Department of Commerce by Executive Order 9841, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate."

this Act or section 37 of the Criminal Code, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.